No. 12549

In the United States Court of Appeals for the Ninth Circuit

MIKE J. FEELEY, APPELLANT

v.

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE HOUSING EXPEDITER, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF OF APPELLANT

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To more clearly visualize the facts and the law we will follow the precepts of two famous jurists:

> "We must think things not words, or at least we must constantly translate our words into the facts for which they stand if we are to keep to the real and the true."
>
> Justice Oliver Wendell Holmes
> Collected Legal Papers: P. 238.

> "The logic of words must yield to the logic of reality."
>
> Justice Brandeis
> *Di Santo v. Penn*
> 273 U.S. 34, 43; 71 L. ed. 524, 529.

THE CHANGING FACTS AND THE CHANGING LAWS

Upon the termination of the war there was a complete reversal of legislative policy to a peacetime economy by the lifting of controls over wages, salaries, materials, manpower, prices which included rents as we shall hereinafter prove. By this turn about in congressional policy it was hoped "that adequate prices . . . (will) stimulate the production of the things desired." Among the things needed particularly were dwellings.

> Leg. Hist. U.S. Code Cong. Service 1946, P. 1297
> *Woods v. Polino,* 86 F. Supp. 650, 654.

When Congress terminated the E.P.C.A. of 1942 it didn't cut the cloth by leaving behind a small piece to retain control of rentals. It shelved the entire bolt. The Housing and Rent Act of 1947 was a cloth of an entirely different pattern which differences were brought out on pages 6 and 7 of our opening Brief and which will be stated in abbreviated form in the Appendix.

Obviously such a drastic change in the law — the standard of legal conduct—is bound to bring into question the applicability of cases and administrative regulations based on a prior legal standard. A change by the higher power is bound to affect the lower, otherwise the tail will be wagging the dog.

Let us emphasize that Congress followed through

with price and rent decontrols even in the Housing and Rent Act for many accommodations were excluded and of those controlled a new legislative policy was established in Sec. 1891 50 App. U.S.C.A. (Sec. 201 of the act) whereby landlords are permitted to obtain a reasonable rental and only prohibiting heavy increases and as to these restrictions further limitations were imposed as to time and area.

> "A change in language is indicative of an intention to change the law and the court may give little or no weight to an administrative construction of a prior statute in determining the meaning of a subsequent and materially changed statute."
>
> 42 Am. Jur. 410, 411, *Spring City etc. v. Com-of Int. Rev.,* 292 US 182; 78 L ed. 1200.

The changed objective in the Housing and Rent Act is to encourage the investment of money in the housing field because there exists an acute housing shortage. The Expediter admits on pages 7 and 8 of his Brief that it was the intention of Congress by the passage of this Act to "create more housing" but there he stops, for he cites cases decided under the E.P.C.A. such as *Elma Realty Co. v. Woods*, 169 F. 2d 172 (C 1), on the dogged assumption that the two acts are the same in purpose, intention and language.

Even simple words are given stretched meanings under the guise of administrative regulations by the Expediter to maintain War Emergency Price Controls.

Here is an illustration taken from page 55 of his Brief.

> "For the purposes of this paragraph (8) the word 'conversion' means (1) a change in a structure from non-housing use or (2) a structural change in a residential unit. . . ."

According to the Expediter, if a clothing manufacturer converted his business to making buttons he wouldn't be making buttons unless there was a change in the structure or a structural change.

> "Administrative construction will not be permitted to override the plain language of the law . . . accordingly, where a statute is not ambiguous and its construction is not doubtful, the rule that Courts will give way to an administrative construction in determining the true meaning of a statute is not applicable even though the statute has been reenacted in the light of such construction."—42 Am. Jur. 403, 404, citing cases.

> "There are several general limitations upon the doctrine that the administrative construction will be given weight. . . . Chiefly, they are that the statute must be one subject to construction, that it is ambiguous, that judicial construction is wanting, and that the administrative construction must be reasonable, must not enlarge or restrict the scope of the statute and must have been made in the discharge of official duties."—42 Am. Jur. 400, 401, citing cases.

More of such stretched—if not transplanted—meanings will be quoted later.

ENCOURAGEMENT TO INCREASE HOUSING

What Congressional purpose or objective would have been served by Feeley's allowing his accommodations to be condemned by the Health and Fire Departments of the City of Seattle as unfit for human habitation? It is admitted that he was not responsible for this condition. Sure, the premises would have been under control but what would the Expediter have controlled without tenants? Pointedly, it would have decreased housing accommodations in Seattle. Was that the objective Congress had in mind?

The suggestion of Appellee on page 17 of his Brief that all a landlord would have to do to decontrol his premises is to negligently permit it to be condemned by the City authorities. The answer to this argument is that Appellee must have had in mind an insane, incompetent or foolish person because none other would so depreciate his property as to render it practically valueless. Worse still, such a financial suicidal procedure would involve the financial risk of converting it by paying tremendously increased prices to rehabilitate and renovate it. The Court will take judicial notice that the cost of building materials, labor and house furnishings have tremendously increased since the war. In addition the foolish landlord would have to overcome the bad reputation given to the property as a former condemned building. In support of Appelle's contention that Feeley added nothing to increase the housing accommodations of Seattle he cited

the Elma Realty Co. case *supra*, where the premises were partially destroyed by fire. This suit was brought under the E.P.C.A. and that Act was strictly construed and therefore has no application here. To the inferred argument that a landlord would "fire" his premises to decontrol it the answer is, that landlords as a class are not going to become wholesale arsonists.

Feeley, in line with Congressional policy, took an unhealthy and unsafe building expending thousands of dollars for labor, material, furniture, furnishings and equipment and rehabilitated and renovated it for occupancy. It was a non-housing building. Had it remained vacant—which it was for two months — it would have been zero housing. He added 17 units and according to a law of mathematics over which the Expediter has no control, 17 added to zero makes 17. We therefore contend that Feeley's actions come within the purview of Sec. 1892 50 App. U.S.C.A. (Sec. 202 of the Act) which eliminates from control the following accommodations

> "(3) Any housing accommodation . . . which are housing accommodations created by a change from a non-housing to a housing use on or after February 1, 1947 or which are additional housing accommodations created by conversion on or after February 1, 1947."

FEELEY'S ACCOMMODATIONS WERE THOSE OF A HOTEL

Feeley's services were those furnished only in hotels.

On pages 9 and 10 of our Brief we cite cases where a variety of lesser services were offered in establishments approved as hotels. With all due respect to the deceased Trial Judge, "he hadn't been around hotels" as was the writer who slept in many a "Hotel de Bum"—this was years ago—many of which still exist today in the poorer sections of large and small cities where the only "accommodation" is a bed; a bathroom down the hall and where telephone service, bell boy service and the like are unknown. It is admitted that Feeley furnished more hotel services to his occupants than did most hotels (R 12, 39). More frequently than not hotels rent by the day and week. This was true in Feeley's case for in the Findings (R. 21) the Trial Judge found "The tenants were permitted to remain in possession for short and odd terms."

GEOGRAPHICAL FACTS

The "Transplanting" of "June 30, 1947"

Contention is made on page 20 of Appellee's Brief that since Feeley did not operate his apartment-hotel until after June 30, 1947 his accommodations do not come within the provisions of decontrol in Section 202 of the Act.

First let us state that Seattle in 1940 had less than 400,000 population according to the United States Census and it has considerably less than 2½ million in 1950.

The Act divides the decontrolled hotels according to population. Sub-paragraph (A) of Sub-section (c) of Sec. 202 of the Act (Sec. 1892 50 APP. U.S.C.A.) sets forth the services required for hotels for cities of less than 2½ million according to the 1940 Census.

Nowhere in Sub-paragraph (A) pertaining to cities the size of Seattle is there any mention of June 30, 1947.

However, there is mention of that date in Sub-paragraph (B) pertaining to cities such as Chicago and New York, the only two having populations of more than 2½ million. It is pointedly so directed.

On the last two lines of (B) appears the following: . . .

> ". . . for the purpose of this Sub-paragraph (B)—
>
> (1.) (Describes a certain term.)
>
> (2.) The term 'hotel means any establishment which on June 30, 1947 was commonly known as a hotel . . ."

Upon what legal theory does the Expediter claim the power to transplant a word, phrase, or date from one statute or a part of a statute to another which the Congress has seen fit to exclude? Do not geographical facts in statutes or cases mean anything to him?

He cites *Woods v. Oak Park etc.*, 179 F. 2d 611 (7 C) which involves a Chicago Hotel and which according to the 1940 census had more than 2½ million population.

Koepke v. Fontecchio, 177 F. 2d 125, 128 (9 C)

"A statute may not under the guise of interpretation be modified, revised, amended, destroyed, remodelled or rewritten or given a construction of which its words are not susceptible or which is repugnant to its terms."

50 Am. Jur. 213, 214.

THE INEQUITABLE RENTALS

Suit was brought by the Expediter against Feeley on February 21, 1949 (R. 6). At that time Feeley was operating accommodations as a hotel and was charging hotel rates. May 18, 1949 a new rental rate was established by the local Expediter (R. 11). The case was then in court. Aside from asking permission from the Court to appeal what reason could Appellant give as a basis for such an appeal to the Appellee? If the Appellant had apealed no doubt the Apellee would have denied the appeal on the ground that Feeley had not had sufficient time to determine that the rates so established were too low.

This is not a case where a rental rate is established for a long time and a landlord has had an opportunity for determining from the actual cash receipts and expenses paid that the established rates are too low.

The facts in this case are altogether different than any of the cases cited by counsel. It was not until after Appellant discovered the damage done by the earthquake in Seattle which was not latent, and the

loss of commercial revenue (R. 28) and which had been figured in the income, that Feeley realized that the rentals were too low to operate excepting at a big loss. There is no procedural remedy for this kind of a case. The pertinent facts for an equitable increase didn't take place until after the trial. The Trial Court should have allowed us to petition for new rates in the light of the increased expenses to cover the losses. Equity doesn't suffer a wrong to go without a remedy.

We respectfully submit that Feeley's apartment-hotel was not subject to control because it was: additional housing; converted from an empty building; and a hotel. That if, the accommodations were subject to control, that the case be reversed so that Feeley be permitted to petition for an increase of retroactive rentals to cover the additional expenses incurred and thereby lessen the amount of the judgment.

Respectfully submitted,

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APPENDIX

Housing and Rent Act of 1947 and amendments.

Sections in 50 App. U.S.C.A. will be cited because they contain the Congressional trends from 1947 on. Sections of the Act will appear in parentheses.

Secs. 1881 to 1884 provide housing assistance for veterans.

Sec. 1891 (201) recites the declaration of policy for the Act; reaffirms the policy expressed in the Price Control Extension Act of 1946 (which provided for the decontrol of prices and rents) excepting that during the period of transition certain rental restrictions will have to be imposed but with a view that hardships to landlords shall be eliminated.

Sec. 1892 (202) defines the various terms including controlled and decontrolled accommodations, hotels, motels, etc. This is the principal section that both parties are claiming their rights flow from.

Sec. 1893 (203) provides for the termination of rent control under the Emergency Price Control Act.

Sec. 1894 (204) provides the manner in which the Act shall be administered; requiring the Expediter to allow the landlord "a fair net operating income"; established local advisory boards to recommend decontrols in areas and adjustments of rents, etc.

Sec. 1895 (205) provides for the recovery of dam-

ages by the tenants. After the suit was brought against Feeley this section was amended to permit the United States to bring the action.

Sec. 1896 (206) provides the manner in which the Act may be enforced.

The remaining sections of the Act are of no consequence here excepting some of the sections recite new terminations and reenactments of the Act.